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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1600

BOMBARDIER LIMITED and
BOMBARDIER EAST, INC.,
Petitioners,

v.

ENGINE SPECIALTIES, INC.,
Respondent.

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
1. The Court Has Jurisdiction To Entertain The Petition	2
2. Petitioners Did Not Waive Their Objections To The Trial Court's Rulings On The Per Se Rule And On Brunswick	4
Conclusion	6
Appendix	E1

TABLE OF AUTHORITIES

Cases:

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)	1
Department of Banking v. *Pink*, 317 U.S. 264 (1942)	3
Engine Specialties, Inc. v. *Bombardier Ltd.*, 615 F.2d 575 (1st Cir. 1980)	4
F.T.C. v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952)	3
Forman v. *United States*, 361 U.S. 416 (1960)	3
United States v. *Adams*, 383 U.S. 39 (1966)	3

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Respondent's opposition to the petition for certiorari raises four points: (1) that the Court lacks jurisdiction to entertain the petition because it was untimely filed; (2) that petitioners waived their objections to the district court's instructions on the *per se* rule against division of markets and on the requirement of antitrust injury under *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); (3) that there is indeed a *per se* rule which prohibits a manufacturer from entering a new field through a joint venture with a manufacturer already in the field if the first manufacturer could have entered with its own product; and (4) that the court of appeals' decision on *Brunswick* was proper and does not conflict with the decisions of other circuits.

We have already dealt adequately with the third and fourth points in our petition.[1] Neither the jurisdictional point nor the waiver point has any validity, as we briefly demonstrate below.

1. The Court Has Jurisdiction To Entertain The Petition.

On July 26, 1979, the court of appeals entered a single judgment, *nunc pro tunc* July 25, 1979, which both affirmed that part of the district court's judgment in favor of plaintiff-respondent Engine Specialties, Inc. ("ESI") on its division-of-markets claim and reversed that part of the judgment in favor of co-plaintiffs Durham and Watercraft, who were sub-distributors under ESI and who relied on the same division of markets theory. (Pet., App. B) [2] All three plaintiffs were represented by the same attorney. On August 3, 1979, Durham and Watercraft filed a petition for rehearing under F.R.A.P. 40, thus staying the mandate. After briefing, on February 21, 1980, the court of appeals affirmed the corrected judgment entered on July 26, 1979, *nunc pro tunc*. (Pet., App. C) Four days later, petitioners moved for a further stay of mandate pending application for a writ of certiorari from this Court. That motion was granted and the mandate was stayed to April 14, 1980, on condition that the petition for a writ of certiorari be filed by that date (Pet., App. D), which was done.[3] At

[1] We note that respondent has still not been able to find a case holding that the *per se* prohibition against horizontal divisions of markets applies when one of the agreeing parties is a "potential" entrant only in the sense that it could have entered the market by manufacturing a product it had never before manufactured or sold.

[2] The petition for certiorari will be cited as "Pet." and appendices therein shall be cited as "App. ——." The opposition to the petition will be cited as "Opp."

[3] Durham and Watercraft filed a cross-petition on May 21, 1980, No. 79-——.

no time between July 26, 1979, and February 21, 1980, did the court of appeals issue a mandate, nor did respondent seek to execute on that portion of the judgment rendered in its favor.

Respondent's jurisdictional argument is simply wrong on both the law and the facts. A timely-filed petition for rehearing suspends the judgment and tolls the running of the ninety-day period within which a petition for certiorari must be filed. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942); *Forman* v. *United States*, 361 U.S. 416 (1960).

Respondent cites no case in which the Court has refused to consider a petition for certiorari filed within ninety days of a court of appeals ruling on a timely petition for rehearing. Instead, it relies on *F.T.C.* v. *Minneapolis Honeywell Co.*, 344 U.S. 206 (1952), a case which has no application here, and *United States* v. *Adams*, 383 U.S. 39 (1966), a case which supports the exercise of jurisdiction here.

In *F.T.C.* v. *Minneapolis-Honeywell Co.*, the Court ruled that a paper filed with the court of appeals after the time for requesting a rehearing had past, which simply sought and prompted court action that could not and did not affect the merits of the decision challenged in the petition for certiorari, could not be characterized as either a petition for rehearing or as a motion to amend judgment. Thus, the Court refused to entertain a petition for certiorari filed more than ninety days after the court of appeals' initial and only decision on the merits. 344 U.S. at 211.

In *United States* v. *Adams*, a case in which the court of appeals initially ruled on the validity of a patent and subsequently, on a motion to amend judgment, ruled on related contract issues, the Court entertained a petition for certiorari filed within ninety days of the second judgment because the motion to amend was timely filed

and the patent and contract issues were "inextricably linked". 383 U.S. at 41-42.

Here, as in *Adams*, the petition for rehearing was timely filed and the issues raised therein are closely related to the issues raised in the petition for certiorari. The petition for rehearing sought a redetermination of the standing of respondent's co-plaintiffs. As such, it necessarily raised questions central to the court of appeals' basic approach to antitrust liability and injury and thus provided an opportunity for the court to expand upon the antitrust concepts it applied in the case. Indeed, the opinion of Chief Judge Coffin, dissenting to the denial of the petition for rehearing, addressed the division-of-markets theory under which petitioner had been held liable to respondent. *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 615 F.2d 575 (1st Cir. 1980). The Chief Judge's reasoning, had it been adopted by the majority, would have affected the posture of the petition now presented to this Court.

In short, there is no question that this Court has jurisdiction to entertain the instant petition.

2. Petitioners Did Not Waive Their Objections To The Trial Court's Rulings On The Per Se Rule And On Brunswick.

Respondent places heavy reliance on its assertion that petitioners waived both issues they raise in the petition for certiorari. The very portions of the record on appeal which respondent cites, however, flatly contradict its contentions and indeed show that respondent's various factual assertions cannot be accepted at face value.[4]

[4] Although we hesitate to burden the Court with record details at this stage of the proceedings, we have attached as Appendix E to this brief the trial transcript respondent cites (Opp., p. 14) on waiver issues to show conclusively that respondent's contentions are untrue.

Respondent first asserts that petitioners conceded that the trial court could properly instruct the jury that an agreement not to compete between potential competitors was a *per se* violation. (Opp., p. 14) As we pointed out in our petition, petitioners did not waive their objection to the trial judge's instruction on this point and instead made their objection in the proper manner and at the proper time. (Pet., p. 7 n.3; App. E13).

Respondent also contends that petitioners waived the *Brunswick* argument in the trial court. (Opp., pp. 24-26) Respondent states that (a) it contended that antitrust injury did result if Agrati's decision to terminate respondent's contract was caused by Agrati's fear of petitioners' entry into the market, (b) petitioners conceded that if the jury were given such a causation instruction, petitioners would be satisfied, and (c) the trial judge in fact gave such an instruction.

The first two statements are true. The third is demonstrably untrue. The trial judge never gave such an instruction to the jury. Nowhere in the judge's instructions cited by respondent in its brief and included herein as Appendix E, did the judge instruct the jury that it must find that petitioners' threat to enter the market caused Agrati to terminate respondent's contract. Thus, of course, petitioners could hardly object. Absent such an instruction, there was no basis, under *Brunswick*, on which the jury could find that the division of markets caused compensable antitrust injury to respondent, and it is the court of appeals' failure to so rule that is at issue here.[5]

[5] Respondent also asserts that the court of appeals stated that Bombardier's conduct "deprived ESI of the opportunity to participate in the competition between Bombardier products and Agrati products." (Opp., p. 30) Counsel for ESI was specifically asked by the trial judge if it was making such a contention, and counsel disclaimed any such intention. More-

Thus, it is clear that petitioners did not waive their contentions now raised on petition for certiorari. Respondent's distortions of the record should not overshadow the basic questions at issue: Did the court of appeals create a new, anti-competitive, *per se* rule? Did it misapply the *Brunswick* doctrine?

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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over, the court of appeals at no time indicated that ESI was so deprived or that it would have benefited from the competition that might have resulted from the introduction of both Bombardier and Agrati products. It only states that ESI was eliminated from competition generally—because it went out of business.

APPENDIX

APPENDIX E

Excerpts from the Consolidated Appendix on Appeal Cited in Respondent's Opposition to the Petition *

[3863] [THE COURT] . . . antitrust purposes, and I will elaborate on that in a minute, is the one that was initiated on the 14th of November, and the statements to which I have made reference occurred in mid-September, so there is another illustration of the importance of chronology here.

Now turning to the specifics of the first claim under Count 2, that has to do with the division of markets. The law is that there are some types of agreements which, without more, are violations of the antitrust laws. The best illustration is an agreement to fix prices, but another type of agreement which is what is called a per se violation, a sort of ipso facto violation, of the antitrust laws is an agreement to divide markets, to divide up a market, because divisions of markets, that is to say, an agreement between two competitors that they won't compete with each other automatically results in a lessening or suppression of competition, which is exactly what the Congress intended to prohibit when it passed the antitrust laws, so that type of agreement is a violation of the antitrust laws, no matter what the market or what the geographical market or the dimensions of the market in which the competition exists.

You have got people who are competitors agreeing to compete, and without more, they are held to have [3864] violated the antitrust laws, and in this case, the agreement of November 14, 1970 between Agrati-Garelli and Bombardier was on one condition a violation of the antitrust laws, and the condition is, if Bombardier and

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* Page numbers from the Consolidated Appendix appear in brackets.

Agrati-Garelli were competitors, or if they were potential competitors—and, of course, the claim here of the plaintiff is that although Bombardier was not already in the fall of 1970 a competitor in the same market with Agrati-Garelli, it was a potential competitor because it had both the intent and the ability to market a minicycle which would compete with the minicycles being made by Agrati-Garelli and being sold by the plaintiff.

There is a second essential element to the plaintiff's claim, and that is to establish that the conspiracy resulted proximately in terms of the proximate cause that I have just defined: and injury to the plaintiff's business or property of a type which the antitrust law was designed to prohibit or forbid.

You will recall, and there is no need to get into it in detail, that the agreement that was initiated on November 14th said that in essence, Agrati-Garelli and Bombardier wouldn't compete, that Agrati-Garelli wouldn't sell in competition with Bombardier in North America, and Bombardier wouldn't sell in competition with Agrati-Garelli in Europe or outside of North America, and that [3865] should certain new types of motorcycles be developed, depending on the type, one and not the other would make it, and in all events they wouldn't compete against each other.

So you see that is, if they are competitors, a per se violation of the antitrust laws, and the plaintiff, if there is a per se violation, will have established its case under Count 2, provided it demonstrates that it suffered injury to its business or property of the type which the antitrust law was designed to guard against.

So there are really two principal issues on this division of markets claim that is urged by the plaintiff under Count 2. The first is, was Bombardier within the meaning of the rules here a potential competitor of Agrati-Garelli

of the type whose agreement with Agrati-Garelli would amount automatically to a violation of the antitrust laws; and the second is, in consequence of the conspiracy, was there antitrust type injury done to the plaintiff.

Now, understandably, the plaintiff says yes, Bombardier was a potential competitor of Agrati-Garelli. It was on the threshold of entering the same submarket with the Fun-Doo. You will remember that that name apparently was never publicized, but I am going to call the—for convenience, I will call the Bombardier vehicle [3866] the Fun-Doo.

Remember that the claim of the plaintiff and the alleged liability of the defendant in this branch of the case is not dependent on the nature of the submarket. It is not dependent upon whether there was a submarket that the plaintiff contended for, and I will read you that one in a moment. Well, maybe I should read it to you right now.

Plaintiff says that the submarket here was small, two-wheeled vehicles. Let's call them two-wheeled motorcycles. Let's call them small motorcycles, two-wheeled vehicles, small motorcycles with modified motorcycle styling, that is to say, small ones, but they would still look like a motorcycle, two-stroke engines of approximately 50-cc or less, and seat height and wheelbase suitable for adults and children, having features and customer groups which make them a distinct submarket of small motorcycles.

I will talk more about that when we discuss the third or fourth claim of the plaintiffs, in considering they have got two claims under Count 1 and two claims under Count 2, and what I am talking about now is the first, that is, the first of the conspiracy claims based on the antitrust laws, but that issue with respect to the nature of the submarket is not part of this third [3867] claim.

So, as I was saying, the parties have different positions on this issue, and let me say further that the plaintiff must show that Bombardier—by a preponderance of the evidence, that Bombardier had a potential of competing with Agrati in the first half of 1971, that is to say, in the spring or summer of 1971. That must be shown in this case. That is the cause of the type of injury which the plaintiff must show as part of his case, the so-called Brunswick requirement. That is the name of the Supreme Court case that you need not concern yourselves about, but I say that so that the basis for my giving that instruction appears in the record.

So plaintiff says you must determine whether Bombardier had the ability and intention to manufacture and sell a small motorcycle product in the United States in or after 1971—well, I have changed that, so you must find it would be during the spring or summer of 1971—which would have competed with some Agrati product regardless of whether they were minicycles, minibikes, lightweight motorcycles, or whatever.

In assessing Bombardier's ability to make or sell—excuse me, I should say to make and sell a product in competition with Agrati-Garelli, you may consider evidence of Bombardier's having developed a prototype vehicle and tested [3868] it, with good results; its having tested vehicles made by other manufacturers; its having the production capacities to make practically all parts of a motorcycle.

You may consider the testimony of Beaudoin, the President of Bombardier, that it was the November 1970 agreement between his company and Agrati which caused Bombardier not to manufacture its own Fun-Doo, and that the Fun-Doo had the same general dimensions and appeal and appealed to the same general market as the Broncco minicycle.

If you find that Bombardier had the ability and intention to enter the market with a motorcycle product of its own which would have competed with that of Agrati-Garelli's products, then you should conclude that Bombardier was a potential competitor of Agrati-Garelli. The crux is the ability and intent.

The defendant does not contest the principal of law, that is to say, that competitors and potential competitors may not divide markets without violating the antitrust laws, but the defendant's position is that it is the law but it doesn't apply here because Bombardier was not at all that ready and able to get into the market.

Bombardier takes the position that its getting into the market, with all of the problems of starting up a new product, was way down the road, maybe a year or two. [3869] In that respect, there are internal memos within the Bombardier organization which you may remember, and you don't have to remember. You can just take a look at the index of the exhibits when you come back here on Monday, and you will find a nice index of all these exhibits, and they will be in a nice cardboard box or some other container, so when you want to, if you do want to, say, "Now, what was the substance of that memo? " you just look it up on the index and pull it out, and you will be able to read it.

So the issue is, was Bombardier a potential competitor in the sense that I have stated, and the defendant says here are some of the factors you should consider or some of the questions that you should ask yourselves. Did Bombardier have the manufacturing capacity to produce the product in question, meaning the Fun-Doo that would sell? Did Bombardier have it developed already? Did it have in its employ sufficient personnel with the necessary experience to carry out the manufacturing? Did Bombardier have the capacity to sell the product effec-

tively through its existing distribution organization? And had the company already made a decision, or was it still debating internally whether to enter the market with a product of its own manufacture?

In considering these questions, the more you answer [3870] yes, the greater the likelihood that the company was a potential competitor, and vice versa.

So that is one of the key questions on that. If you find that Bombardier was a competitor as defined, then there has been a violation of the antitrust laws.

Does liability of the defendant to the plaintiff therefore follow automatically? The answer is no. There must be two things proved, that is, the conspiracy to violate the antitrust laws as just described, plus this element of injury, and it is the injury on account of the anticompetitive effect of the conspiracy or the agreement. And somewhere here, I have a recent Supreme Court case, in the January 25, 1977 issue of the looseleaf service called Law Week that gives us the recent opinions of the Supreme Court of the United States.

On January 25th, six weeks ago, the Supreme Court decided an antitrust case having to do with bowling alleys, Brunswick Corporation against the Pueblo Bowlamat, Inc., and it discussed quite comprehensively the nature of the essential element that the plaintiff must prove in antitrust cases, including this case.

This principle, I might say, is applicable to this division of markets claim. It has no applicability to the fourth claim, that is to say, the one that I will discuss after a short recess.

[3871] The Supreme Court says here: "Plaintiffs must prove antitrust injury," and the word "antitrust" is italicized, "which is to say injury of the type the antitrust laws were intended to prevent, and that flows from

that which makes the defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."

And here is the practical application of that principle in the facts of this case. The plaintiffs must show that they were injured as a result of the conspiracy, and it was a conspiracy to divide up markets, and the defendant says, in effect, what of it? Here, says the defendant, the injury which the plaintiff suffered was unrelated to the division of the market between Agrati-Garelli and Bombardier. Let's not forget that the division is by the two manufacturers.

So, says the defendant, let's assume that, and let's concede for purposes of the argument that there was a violation of the antitrust laws because Bombardier was a potential competitor. What of it? As a result of the agreement, what happened was that Bombardier never put its Fun-Doo on the market, but what difference does that make to the plaintiff? goes the defendant's argument. The absence of the Fun-Doo isn't what hurt the plaintiff [3872] here. It is the fact that his source of supply from Agrati-Garelli was cut off.

So the per se violation of dividing up world markets, goes the defendant's argument, didn't cause any injury to the plaintiff. The plaintiff's injury says the defendant, is no different than if Agrati-Garelli decided on its own to dump the plaintiff, that is to say, to breach a contract with him or to enter into an exclusive distributorship with some other business other than Bombardier.

So that is the question you must decide. Is the type of injury suffered by the plaintiff the type that the Congress wished to prevent when it made illegal agreements to divide up markets.

Plaintiff submits on this point that as a result of the agreement, there were only two manufactured prod-

ucts instead of one. I am sorry, that is just exactly wrong. There was only one manufactured product instead of two. Plaintiff says if it hadn't been for this agreement, you would have had a Fun-Doo, with its improvements in the course of experience, you would have had the Broncco, that is, the Agrati-Garelli product, with its improvements, and competition would thereby be increased, and it would be beneficial to the plaintiff and to customers generally.

[3873] Plaintiff also says that it was only as a manufacturer with an enormous balance sheet and bank account and dealer organization that Bombardier was able to threaten Agrati-Garelli into entering into their agreement with Bombardier, that it was the status of Bombardier with its large economic muscle that—and the misuse of that strength, you see, which served to damage and injure the plaintiff.

And further, says the plaintiff, not only did the agreement result in only one product instead of two, as between these two manufacturers, but there was additional damage to the plaintiff of an antitrust nature when plaintiff found itself competing with the identical products that it was selling.

And lastly, says the plaintiff, the direct consequence of the agreement was to cut off the plaintiff from its source of supply, and, as a practical matter, guarantee its insolvency and ultimate dissolution. You will remember the plaintiff went out of business a couple of years after, maybe two or three years after, these events, but, says the plaintiff, it was a one-way street. Once we lost our Agrati-Garelli line, we did our best, but our failure was inevitable, pretty much, and the defendant, in effect, says, that is a lot of nonsense. What put the plaintiff out of business was the plaintiff's

* * * *

[3904] [THE COURT] the agreement. It is just that the distributor—it was an agreement at a different level, the manufacturer level, and for the plaintiff to have refused to join the conspiracy I think may have been irrelevant to the particular conspiracy, again, in view of the Brunswick point, but you may be right. I am just not sure.

I have some doubt that I will get into that separately, but that is the first thing I will at a later point ask Mr. Vanderstar to comment on.

What is your next point?

MR. FREMONT-SMITH: Our Requests No. 46 and 47, defining what is injury, and I think this goes back to the point as to whether we have to be put out of business or—

THE COURT: Well, I will correct that.

MR. FREMONT-SMITH: —or our lost—

THE COURT: Fewer profits or greater losses. I know that.

MR. FREMONT-SMITH: I think you did say it only has to be one factor in causing our injury, there could be other factors.

[3905] Number—I think it was No. 16, where we have requested a specific instruction that parties to a contract have to live up to it in good faith, and there was—your Honor did not mention good faith with respect to live up to a contract.

Your Honor, on the need of conspiracy in the Paddock Pools, your Honor laid it all on the conspiracy between Agrati and Bombardier, whereas the conspiracy could also have existed for the dirty tricks between Bombardier and Bombardier East.

THE COURT: Yes, but that is the first time I heard of that. Richard and I talked about that at some length,

and neither of us could recall your ever having alluded to that. We may be mistaken. Maybe you have in the past.

MR. FREMONT-SMITH: There were meetings between Bombardier—

THE COURT: No. I am talking about making the argument. This is to us a brand new argument. It is one that we discussed as a potential argument. I just don't think we ever heard the plaintiff make it.

[3906] MR. FREMONT-SMITH: Well, evidence is there from which they could find a conspiracy between Bombardier and Bombardier East.

THE COURT: Well, that was my best understanding of the record.

MR. FREMONT-SMITH: Your Honor, I would also take exception to your Honor's statement that if the broader—under Paddock Pools, if the broader market were the one they found, driving us out of business would not be significant on competition. We think driving anybody out of business would be a significant effect on competition even under the broader market, including Honda and Yamaha.

THE COURT: Well, as you know, it is difficult there under Whitten, but we thought that there had to be an adverse effect. That is the difference between the per se and the rule of reason, you know, facets of Whitten, in our view, and that is that if you got a significant factor in the market doing bad things, that is, per se, if it is not significant, there is [3907] no requirement of a significant factor—it becomes a violation under the rule of reason only if there is a suppression of competition in the market.

I think it is dependent upon what the market is, that is all. I cannot really be sure you are wrong, but I don't think you are right.

MR. FREMONT-SMITH: Mr. Frank has— Can he express one point rather than whisper in my ear?

THE COURT: Yes. Don't whisper in my ear.

MR. FRANK: On the question that your Honor suggested was relevant in determining relevant market, that is, whether the Broncco type of vehicle competed in its own pool or whether it competed in a larger pool with the Yamaha and the Honda, we submit that the question —that that is an improper casting of the question, because both of those markets may be relevant, both of those markets may be arenas in which competition takes place. The only question is whether the market for which [3908] we contend is also relevant.

THE COURT: So what do you want me to say? That is what the rule requires, that you tell me what you want me to say. You make an interesting point, but what would you like me to say?

MR. FRANK: We would want you to pose the question as we posed it in our suggested interrogatory to the jury: Whether by means of—whatever the appropriate characteristics are, by means of its distinctive characteristics, distinctive customer groups, small two-wheeled vehicles with motorcycle type styling and so on constitute a relevant product market; and further, that that may be a relevant product market even though there are other relevant product markets which might include other vehicles.

THE COURT: All right. That doesn't mean I will give it. That means I understand it.

Now any more?

MR. FREMONT-SMITH: That is it, your Honor.

THE COURT: Now before I hear from [3909] Mr. Vanderstar, I would like you to comment on the Parke-

Davis point, not now but at some point before you conclude, to state a view on that, and then I don't need your comments on other things. I have already made up my mind whether or not to give other requests proposed here at the side bar by plaintiff's counsel.

MR. VANDERSTAR: All right, then. The objections of Bombardier Limited to the charge as given, your Honor, are these: No. 1, under the Count 1, the failure to charge that an element of the tort is a purpose to cause the plaintiff the specific type of harm that the plaintiff actually suffered. We think that is the law under the Pennsylvania cases.

Now turning to the charge under Count 2, a number of points. A couple of, let me say, preliminary points, failure to give what I call the Sears-Compco charge.

There are sufficient references in your Honor's charge to unfair means of competition and things like that, but I think it would be appropriate to include [3910] a charge that copying another company's product if it is not patented is specifically not unfair, so that—for obvious reasons.

Secondly, another general point, that the antitrust laws are designed to protect the competition and not competitors. You may have covered that in other ways by saying companies go out of business all the time, but I think the difference between the tort and the antitrust in that regard could be—should be emphasized.

On the division of markets, I have a number of problems with the charge. The first is really kind of a factual one. I think your Honor has pretty well instructed the jury that the November 14, 1970 agreement, or, as you called it, an agreement was a horizontal division of markets.

I think on its face it is not. I think it is a document that the jury would have to read and consider before

concluding whether or not it was. There is nothing in that document that prevents Bombardier from competing with Agrati in Milan, for [3911] that matter, Italy, and indeed I am not even sure that the later modifications expressly prohibit Bombardier from competing outside of North America, so I think that it is most unfortunate to characterize that document, especially the November 14th version of it, as an explicit division of the world markets.

There is a related point, and that is that although your Honor gave what I call the joint venture charge, I think our objection on that is the failure to connect that to the division of markets charge. I think the jury has the impression that the November 14th agreement is a division of markets and is a per se violation if, and the only if is if Bombardier was a potential entrant.

I think on the contrary, the document is, on its face, a joint venture agreement which can have a procompetitive effect even if it has an incidental division of markets flavor to it.

So that there is a whole lot more that is in doubt on the division of markets [3912] point than the mere question whether Bombardier was a potential entrant. Indeed, the what I call the toehold point.

THE COURT: Well, I liked that setting out in your requests, I really did. I almost gave it. I really did. I almost did. I liked it. I don't think it is quite relevant, though, you see. It is close, but what is your next point? I mean I didn't give it.

MR. VANDERSTAR: It is the toehold point. We contend the market is a fairly broad one, and you got a little tiny company which is being—that is, ESI, which is theoretically being replaced by Bombardier, which is a good bit bigger and potentially offers more vigorous competition to others in the market, Honda and others.

THE COURT: All right. What is the next one?

MR. VANDERSTAR: On the second antitrust claim, we object to the failure to charge that the plaintiffs must show the defendant was a significant factor in the [3913] market. We went at this yesterday, and I knew what your Honor's view was, but, for the record, we object to that.

We also object, and this is kind of the converse of the point Mr. Fremont-Smith made, we object to your charging the jury that the substitution of Bombardier for ESI, even prior to the strike, the substitution of Bombardier for ESI in the narrow market was a lessening of competition. I don't think that substituting one company for another is ever considered to be a lessening of competition. If you had six companies, you still have six, and, indeed, you may have one of them that is stronger and better able to compete than you did before, so that to me, it is almost per se the other way around.

But at least the point ought to be left open for the jury to decide rather than to have them instructed, in effect, that that was the lessening.

THE COURT: I agree. I will talk about that.

MR. VANDERSTAR: So do you want me to [3914] talk about it?

THE COURT: I say I will agree with you, and I will talk about that.

MR. FREMONT-SMITH: Your Honor, could I be heard about one before you give—

THE COURT: No, no.

MR. FREMONT-SMITH: There could have been seven competitors rather than six.

THE COURT: All I am going to tell them is, it is a jury question.

MR. FREMONT-SMITH: All right.

MR. VANDERSTAR: One final point. I think your Honor went too far in characterizing the testimony of the defendant's experts. I don't think they agreed with the plaintiff's position that there was this narrow submarket.

THE COURT: I didn't say they agreed. I said they lent some support. I used—

MR. VANDERSTAR: Mr. McCormack completely rejected the 50-cc thing and said there is a Suzuki 120 that competes.

THE COURT: Whatever I said probably wasn't complete, but there were elements

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